

**Western Wireless Presentation
WT Docket No. 00-239**

I. Introduction and Overview

II. Background and Context

- A. In the *CMRS Flex 2nd R&O*, the FCC decided to conduct a case-by-case analysis, rather than trying to adopt principles for all time regarding what would be defined as a “mobile service.” This proceeding *only* concerns specific facts in the record about this specific case – no need to address other possible future cases.
- B. Context: Incumbents attempting to saddle competitive entrant with unnecessary regulation. (Note that this is not a preemption case.) The Kansas Corporation Commission requested expedited treatment of the Kansas ILECs' petition, but noted that it already had adequate regulatory authority over Western Wireless as a universal service provider. In the meantime, Kansas has now designated Western Wireless as an ETC for rural telco areas, expressing no need for additional regulatory authority.
- C. Although most of the states that have granted ETC status to Western Wireless have had to address arguments that Western Wireless's universal service (BUS) offering is not CMRS, no state commission has chosen to regulate the service as anything other than CMRS.
- D. The North Dakota Public Service Commission expressly held in August 1999 that Western Wireless's BUS service is CMRS in a case addressing the same facts and the same arguments raised by the Kansas ILECs. On December 28, 2001, this decision was upheld by the North Dakota State Supreme Court.

III. Facts

- A. BUS is just one component of Western Wireless' overall cellular service – it uses same mobile wireless network and CMRS spectrum. The network can't distinguish between the 386 BUS customers and the 45,000 other traditional cellular customers in Kansas.
- B. BUS does not increase cost to other subscribers or degrade quality or growth of conventional mobile service, meeting the requirements of an "incidental" CMRS service offering. 47 C.F.R. § 22.323.
- C. The Telular units –

1. The light-weight units are “capable of being moved,” as all agree
2. “ordinarily do move”:
 - a. It can operate while in motion, with battery power, and functions as part of a network that is designed to support mobile operation
 - b. Customers often use it while in motion, as demonstrated by billing invoices and network data in the record in this proceeding
 - c. Western Wireless stresses mobility in marketing BUS

IV. Law: Statutory Construction, Legislative History, and FCC Precedents

A. Statute

1. Section 332(c)
 - a. Intent of 1993 Budget Act amendment was to deregulate the competitive wireless industry and to achieve regulatory parity among mobile services
 - b. Legislation concerned with carriers, not customer units or individual offerings. Simply grafted new law onto pre-existing definitions of “mobile service” and “mobile station”
 - c. Legislative history clarifies Congressional concern for relaxing regulation in competitive markets where consumers can choose among alternative providers, regardless of radio transmission format. Congress also rejected a Senate provision that would have expressly excluded fixed services such as BETRS from the definition of mobile services.
2. Section 3(28)
 - a. Language unchanged since original 1934 Act
 - b. Source was 1927 International Radio Telegraph Convention, which defined a mobile station as one “capable of being moved which ordinarily does move”
 - c. Limited case law interpreting this definition

- i. *United States v. Betteridge*, 43 S. Supp. 53 (N.D. Ohio 1942) (radio transmitter mounted in a parked automobile constituted a “mobile station”)
- ii. *Sprint Spectrum LLP v. Willoth*, 176 F.3d 630 (2d Cir. 1999) (in dictum, cited Sec. 3(27) as an example of “some of the definitions [in the Act that] are lacking in clarity and apparent usefulness” and stating that the definition is “best characterized as much ado about nothing”)
- d. FCC Rules: Section 22.99 defines "mobile station" as "one or more transmitters that are capable of operation while in motion." This definition captures legislative intent, in both 1934 and 1993, to describe particular types of services (rather than scrutinizing a customer's usage of an isolated product)

B. FCC Precedents

- 1. *Amendment of the Commission’s Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*
 - a. First Report and Order, 11 FCC Rcd 8695 (1996): fixed services are permissible, on a co-primary basis, on all spectrum allocated for CMRS
 - b. Second Report and Order, 15 FCC Rcd 14680 (2000): No “bright line” test to determine which service offerings are CMRS; use a case-by-case approach; eliminated prior notification requirement in § 22.323 (rule permitting cellular carriers to offer “incidental” services)
- 2. *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411 (1994)
 - a. All existing services authorized under Part 22, including auxiliary and ancillary services provided by mobile licensees, fall within definition of mobile service (§ 36)
 - b. “Services provided through dual-use equipment . . . which are capable of transmitting while the platform is moving are included in the mobile services definition.” But “BETRS does not constitute mobile service . . .” (§ 38)
- 3. Pre-1993 Precedents

- a. *Westcom Products, Inc.*, 102 FCC 2d 470, 472-73, ¶ 5 (1985): denied petition for rulemaking to specifically permit fixed operations by cellular licensees as unnecessary, because:

“Section 22.308 [now 22.323] allows licensees to offer as incidental, communication services not incompatible with their licensed mobile operations. We therefore see no need for a rulemaking procedure when ***fixed cellular service may be implemented under existing Rules***. So long as the requirements of Section 22.308 are met, cellular licensees may offer fixed cellular service, in rural areas or elsewhere.”

- b. Note that the FCC specifically excluded BETRS from the category of fixed services that may fall within the “incidental” definition. 95 FCC 2d 769, 819, ¶ 178 (1983); 3 FCC Rcd 7033, 7041, ¶ 66 (1988), *recon.*, 5 FCC Rcd 1138, 1140 ¶ 12 & 1141 n.14 (1990).

V. Public Policy

A. Granting the petition would cause serious harm

1. Would impede competition and run counter to deregulatory policy trends at the federal and state levels, subjecting more providers to tariff and certification requirements
2. Would disrupt many carriers’ current business plans, relying on decades-old definition of “incidental” services
3. Would chill future evolution of services and wireless technology, particularly as carriers consider new product offerings for 3-G and high-speed data services
4. Would chill Western Wireless's continued universal service offerings

B. Denying the petition merely preserves the status quo

1. No states are clamoring to regulate CMRS carriers’ fixed offerings, even in the context of ETC designation proceedings
2. Preserves current FCC precedent on CMRS definition
3. Preserves legislative intent in passing section 332